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Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

October Term, 1986

UTICA MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

EUGENE TALLEY, JUANITA MURPHY,
and
JACKSON COUNTY BANK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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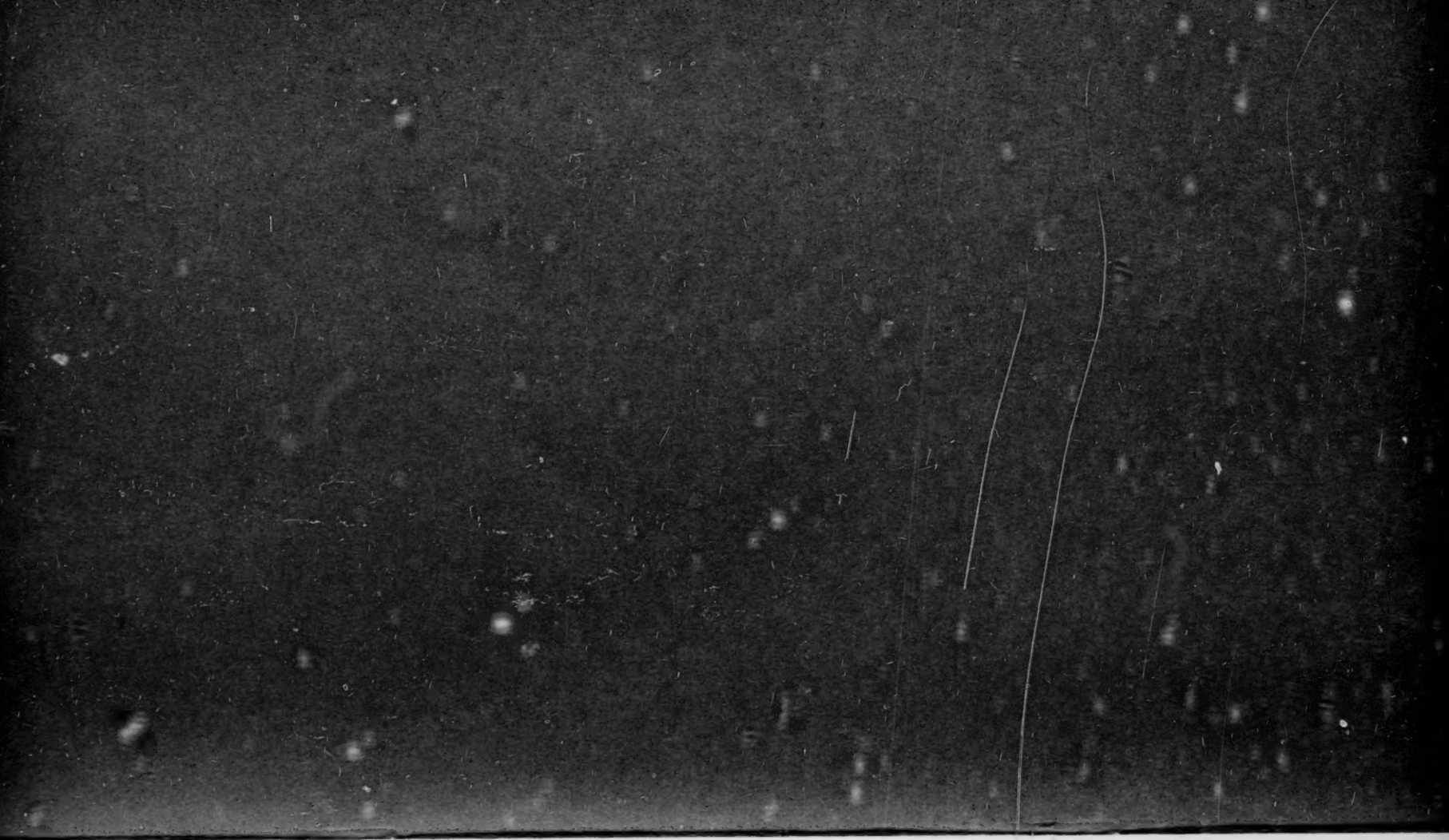

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ARGUMENT

The respondents are aware of the decision of this Court in *Burlington Northern Railroad Co. v. Woods* (No. 85-1088, decided February 24, 1987) holding that the Alabama mandatory affirmance penalty statute (Section 12-22-72, Code of Alabama 1975) has no application to judgments entered by federal courts in diversity suits governed by Alabama law.

The Fifth Circuit applied the Alabama statute in *Proctor v. Gissendaner,* 587 F.2d 182 (1979) assessing a penalty on affirmance of a money judgment. This decision was among those adopted as binding precedent by the Eleventh Circuit follow-

ing its creation in 1981. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (1981).

The decision in *Burlington Northern* thus overrules *Proctor* in diversity actions governed by Alabama law.

Notwithstanding the holding in *Burlington Northern,* respondents submit that the Petition for Writ of Certiorari should be denied for the following reasons:

1. Utica Mutual took its appeal knowing of the Alabama penalty statute and of the well established precedent assessing the penalty in diversity cases from Alabama. The appeal was taken with full knowledge that the Alabama penalty statute would be applied if the judgment was affirmed.

2. In view of Utica Mutual's knowledge of the Alabama penalty statute and its familiarity with the established precedent in the Eleventh Circuit assessing the penalty in Alabama diversity cases, respondents suggest that this Court's ruling in *Burlington Northern* should be given prospective application.

3. The denial of the Petition for Writ of Certiorari will, in effect, give *Burlington Northern* prospective effect.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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